United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1200

To be argued by
PAUL E. COFFEY

B

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1200

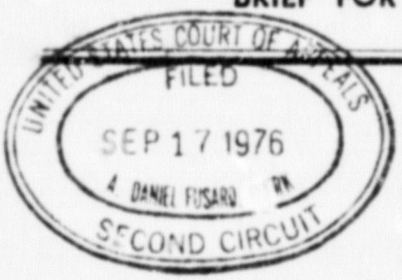
UNITED STATES OF AMERICA,
Appellee,

—v.—

ANDREW A. BUCCI,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE



PETER C. DORSEY
United States Attorney for the District of Connecticut,
270 Orange Street,
New Haven, Connecticut 06510.

PAUL E. COFFEY
Special Attorney,
U.S. Department of Justice.

TABLE OF CONTENTS

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1200

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANDREW A. BUCCI,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

On March 21, 1975 a Federal Grand Jury in Hartford, Connecticut returned a five-count indictment against appellant ANDREW A. BUCCI in Criminal No. H-75-39. Count One, which charged appellant with conspiring to deprive a Federal witness (one Daniel LaPolla) of his civil rights, with death to the witness resulting, in violation of Title 18, United States Code, Section 241, was severed from the remaining counts and consolidated for trial with alleged co-conspirators David Guillette, Robert Joost, and Nicholas Zinni. On September 3, 1975 appellant was acquitted of this charge.[1] Counts Two, Three,

[1] For a complete history of the underlying offense to which Daniel LaPolla was a witness, *see United States* v. *Marrapese*, 486 F.2d 918 (2d Cir.), *cert. denied*, 415 U.S. 994 (1974). For the follow-up prosecutions arising out of LaPolla's murder, see the file on appeal in *United States* v. *Guillette, et al., Docket No.* 76-1041 which is currently under advisement.

and Four charged appellant with the substantive crime of inducing his client, William Marrapese, to perjure himself in a federal criminal trial in Hartford, Connecticut in December, 1972, in violation of Title 18, United States Code, Section 1623. The December, 1972 trial against Marrapese was for the alleged interstate transportation of stolen M-16s, a case in which LaPolla was scheduled to testify prior to his murder on September 29, 1972. Count Five charged the appellant with conspiring with Marrapese to present false testimony at the M-16 trial in violation of Title 18, United States Code, Section 371, in December, 1972. On January 27, 1976 the appellant's trial on Counts Two through Five commenced before the Honorable M. Joseph Blumenfeld and a jury of twelve. The jury convicted appellant on all four counts. On March 25, 1976, Judge Blumenfeld overturned the verdicts of guilty on the three substantive Section 1623 counts. The conspiracy conviction on Count Five was upheld. On April 8, 1976 Judge Blumenfeld sentenced appellant to ten days, imposition of sentence suspended.

Statement of Facts[2]

On November 21, 1971 thirty M-16 machine guns were stolen by persons then unknown from the Westerly, Rhode Island National Guard Armory (Tr. 68). On January 11, 1972 Internal Revenue Service (I.R.S.) Special Agent

---

[2] References to the testimony at trial will be "Tr.—". With respect to William Marrapese's testimony, however, the pagination is not easy to follow and in some parts is interrupted. Marrapese's direct examination begins on the 127th page of Volume 1, but is paginated as p. 2. The direct examination ends in Volume 2 at p. 65. Redirect examination immediately follows on the next page, which is designated as p. 304. Marrapese's cross-examination is in a separate volume. References to Marrapese's testimony therefore, will be "BM direct—" and "BM cross—".

(S/A) William Smith contacted one Daniel LaPolla in Oneco, Connecticut (Tr. 17), which is located on the Rhode Island border (Tr. 1 The visit was unrelated to the M-16 case. S/A Smi met with LaPolla again on January 18, 1972 and, as a result of a conversation with LaPolla, S/A Smith contacted S/A Salvatore Petrella of the Bureau of Alcohol, Tobacco and Firearms (A.T.F.), Department of the Treasury (Tr. 20). The upshot of these discussions was that twenty-nine of the thirty stolen M-16s were recovered on January 25, 1972 in a water-filled rock quarry near LaPolla's rural home (Tr. 20-22; 67). On March 31, 1972, LaPolla, who was then co-operating in the M-16 investigation, wore a body-transmitting device into a business run by William Marrapese in Cranston, Rhode Island (Tr. 25-28). LaPolla recorded a conversation between Marrapese, Nicholas Zinni, and himself concerning the sale of these M-16s. On May 3, 1972, LaPolla appeared before a federal grand jury in Hartford (Tr. 29). On the same day, Marrapese, Zinni, Robert Joost and David Guillette were indicted by the grand jury for the interstate transportation of these M-16s from Westerly, Rhode Island to Oneco, Connecticut (Tr. 64; Government Exhibit #5). According to Marrapese, who testified at appellant's trial below, on Sunday, November 21, 1971, the morning of the M-16 theft, Joost and Guillette came to his home in Cranston, Rhode Island with the stolen guns. (BM direct, 14). Marrapese agreed to help hide the weapons by getting in touch with LaPolla through Nick Zinni (BM direct, 14). Zinni called LaPolla, (BM direct, 15) and all four individuals drove to LaPolla's house (BM direct, 16). Upon reaching their destination, the group unloaded the M-16s from Guillette's car into LaPolla's home (BM direct, 18). Marrapese retained one weapon as a display item in helping to sell the other twenty-nine weapons. When Marrapese was arrested by A.T.F. agents on May 4, 1972 and later released

in Hartford, he was represented by the appellant, ANDREW A. BUCCI. On the way back to Providence after his release, Marrapese fully disclosed to BUCCI his involvement in the transportation of the M-16s (BM cross, 76). Prior to the December, 1972 trial on these charges, Marrapese told BUCCI that he was guilty (BM cross, 7).

After the M-16 indictment was returned, Petrella and Smith prepared transcripts and duplicate copies of conversations recorded and/or transmitted by LaPolla and sent the duplicate tapes to counsel for Marrapese and Zinni (Tr. 28, 29, 49-50, 72-73). The original tape recording of the March 31, 1972 conversation, and the copy sent to the defense, were of poor audibility. On September 29, 1972 LaPolla was murdered in a dynamite explosion, an offense for which Marrapese was convicted subsequent to the M-16 trial in December, 1972. The defense had already concluded that, because of the poor quality of the tapes, the recordings were no longer admissible (BM direct, 44; BM cross, 100). With LaPolla dead, Marrapese and Bucci went to trial in December with the belief that the government had no case (BM direct, 46; BM cross, 106).[3]

At the M-16 trial, however, the government succeeded in introducing into evidence that portion of the March 31, 1972 tape, and a transcript thereof, which contained the discussion between Zinni, Marrapese, and LaPolla about selling the M-16s (Tr. 51; 53). This was accomplished in part by government efforts to electronically reduce background noise to increase the tape's audibility (Tr. 54). The government also put into evidence at the M-16

---

[3] LaPolla's death did, indeed, leave the government without a case against Joost and Guillette and the charges against them were later dismissed.

trial Nick Zinni's toll call records for November, 1971, which showed a toll call at 6 34 a.m. on November 21, 1971 to LaPolla's residence (Tr. 87-89). Suddenly, to the defense's surprise, the government had a colorable case (BM direct, 63). The M-16 defense, which up to then had not decided of Marrapese would take the stand, quickly decided that voice experts from the University of Connecticut should be interviewed to determine if someone would testify that the March 31, 1972 tape was too poor to make voice identification (Tr. 47-48). Such testimony would impeach the voice identifications of Zinni and Marrapese by Agents Smith and Petrella. On December 19, 1972, after testimony of government witnesses had ended for the day, Marrapese, Zinni, and John O'Neil, Zinni's attorney, went to Storrs, Connecticut and interviewed two speech experts at the University of Connecticut and secured their opinion on the audibility of the March 31 tape (BM direct, 50). The two M-16 defendants and O'Neil then returned to the Hartford Hotel where the group was staying to brief Bucci on their trip (BM direct, 51).

BUCCI told Marrapese that after the voice experts testified for the defense to the effect that voice identification on the tape recording was too poor to permit reliable identification of voices, it would be a good idea for Marrapese to take the stand anyway and admit that his voice was on the tape (BM direct, 51). This would make Marrapese look honest. (*Id.*) Since such an admission, however, would create a problem in explaining how Marrapese came to have knowledge of the M-16s prior to March 31, 1972 (BM direct, 51; compare with the tape transcript, at p. 54-56), BUCCI suggested that Marrapese state that on an earlier occasion in March, 1972 LaPolla came to Marrapese's home and mentioned the weapons for the first

time (BM direct, 51). A dress rehearsal was conducted; when Marrapese slipped up on a few details, BUCCI "conjured up" facts to fill in details (BM direct, 52). Zinni flunked the dress rehearsal so badly that it was decided he would not testify (BM, direct, 53). Marrapese picked out March 17, 1972 as the date he would claim he first discussed the weapons with LaPolla since he had had a heart attack a year earlier on that date and could remember it. Marrapese and BUCCI also decided in the hotel room that a reference to "Bobby and Davie" in the tape recording by Marrapese would be explained as an innocent reference to Robert Germani and David Henebury, when in fact the reference was really to Joost and Guillette in a criminal context (BM, direct, 57-59). This was done to avoid "bag(ging)" Joost and Guillette (BM, direct, 58). During this rehearsal, BUCCI knew that Marrapese's explanations were going to be untrue and several were planned at his direction and suggestions (BM, direct, 59; 60, 61). The ultimate plan was to have Marrapese take the stand and deny any involvement in the transportation of the stolen M-16s, or discussion with LaPolla about weapons until March, 1972 and to deny that he (Marrapese) ever knew the weapons were stolen (BM, direct, 61). It was BUCCI's decision that Marrapese should testify to this (BM, direct, 62). Later in the M-16 trial, Marrapese did take the stand. He falsely testified on direct that he first talked to LaPolla about the M-16s in March, 1972; that he did not participate in the transportation of the M-16s on November 21, 1971; and that he had never been to LaPolla's residence prior to June, 1972. At appellant's trial, Marrapese admitted that he perjured himself and testified falsely with

respect to these denials and did so with appellant's consent and guidance (BM, direct, 6-9).[4]

The defense, as its case, called only a psychiatrist, Dr. Frank Sullivan, who testified that Marrapese never told *him* during 1972 or thereafter that he had participated in the M-16 transportation. Sullivan also described some of Marrapese's mental and physical conditions which, according to Dr. Sullivan, showed Marrapese to be a nervous and pressured individual.

Statement of the Issues

I.

Was the evidence at trial sufficient to sustain appellant's conviction for conspiracy to make a false sworn statement?

II.

Under the facts of this case, was the government required under Section 1623, Title 18, United States Code to prove irreconciably inconsistent statements and to establish corroboration?

---

[4] In this part of his testimony in the trial below, Marrapese testified that at the M-16 trial he responded affirmatively to questions whether he had "taken the stand", "testified falsely", and "perjured" himself with respect to the answers set out as perjury in the indictment against appellant BUCCI. Judge Blumenfeld ultimately concluded that, with respect to Counts Two-Four, the substantive counts of inducing this perjury, Marrapese's answers were insufficient to establish that his testimony was "under oath". The convictions on these counts, therefore, was set aside.

The Statute Involved

§ 1623. False declarations before grand jury or court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

* * * * *

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence. Added Pub.L. 91-452, Title IV, § 401(a), Oct. 15, 1970, 84 Stat. 932.

DISCUSSION OF THE LAW

I.

The evidence was sufficient to sustain a verdict of guilty on Count Five.

Our discussion of the law relies upon all reasonable inferences taken in the light most favorable to the government. *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972). Count Five charges a conspiracy between BUCCI and Marrapese to have Marrapese falsely testify at the M-16 trial. This conspiracy agreement was reached on the evening of December 19, 1972 in the Hartford Hilton wherein the defendant and Marrapese both actively concocted a false explanation concerning the manner in which Marrapese became associated with the stolen M-16s. As the Court will note, the overt acts alleged in furtherance of the conspiracy state that Marrapese took the witness stand and testified as to three specific denials. The overt acts paragraph does not state that Marrapese was "under oath", it only states that Marrapese "testified", which is, of course, what Marrapese said he did. It has long been established, and cannot be questioned, that the offense of conspiracy is complete when the conspirators agree upon the criminal venture and one of the parties does some act in furtherance thereof. The essence of the conspiracy is the agreement and not the commission of the objective substantive crime.

United States v. *Rabinowich*, 238 U.S. 78, 87-89 (1915). Even if Marrapese was not under oath at the M-16 trial, and thus incapable of perjuring himself, this would not be a bar to a conspiracy conviction against him or against his co-conspirator ANDREW A. BUCCI. *Id.*, at p. 86. A failure of the conspiracy to succeed is likewise no bar to a conspiracy conviction. *United States* v. *Abel*, 258 F.2d 485, 489 (2d Cir. 1958), *aff'd*, 362 U.S. 217 (1960); *Cross* v. *United States*, 392 F.2d 360, 363 (8th Cir. 1968). Since the overt act need not be in itself a crime, *Yates* v. *United States*, 354 U.S. 298, 334 (1957), the mere act of taking the witness stand was clearly sufficient to constitute an overt act, even if for some reason Marrapese thereafter did not testify at all, or in some other way was unsuccessful in committing perjury. *Outlaw* v. *United States*, 81 F.2d 805 (5th Cir. 1936), *cert. denied*, 298 U.S. 665 (1936); *Hall* v. *United States*, 78 F.2d 168 (10th Cir. 1935). As evidence that Marrapese's M-16 testimony was in furtherance of the conspiracy (even if we assume it was not under oath) we need look only to his direct testimony.[5] The fact that Marrapese was, *inter alia*, an admitted perjurer and convicted felon is not a bar to a conviction and the fact that the government must sometimes of necessity use witnesses with such backgrounds, because they are the only eye-witnesses, is not unusual. *See, e.g. United States* v. *Pacelli*, 521 F.2d 135, 138 (2d Cir. 1975); *United States* v. *LaSorsa*, 480 F.2d 522, 524 (2d Cir.), *cert. denied*, 414 U.S. 955 (1974). Judge Blumenfeld specifically cautioned the jury that

---

[5] BM direct 65:

Q. When you had this discussion with Mr. Bucci after you completed your testimony, what did you say and what did he say about how you had performed on the stand? A. Well, he thought I done all right on the stand . . .

Q. Did you indicate to Mr. Bucci how you felt you had done? A. I had thought I done all right.

they should weigh Marrapese's testimony with great care and pointed out to the jury that his testimony about the subornation was uncorroborated. It is settled, however, that such testimony, even if uncorroborated, is sufficient to convict. *United States* v. *Lee*, 506 F.2d 111 (D.C. Cir.), *cert. denied*, 95 S.Ct. 2403; *United States* v. *Montgomery*, 503 F.2d 55 (8th Cir. 1974), *cert. denied*, 95 S.Ct. 830. *See also*, Section 1623(e).

In his attack on the sufficiency of the evidence, appellant curiously relies upon the sentencing remarks of Judge Blumenfeld [6] as an indication, as appellant views it, that Judge Blumenfeld did not believe Marrapese. Of course, it is hornbook law that the credibility of Marrapese was for the jury to decide and the jury was free to accept Marrapese's testimony alone as sufficient to convict. *Lee*, *supra*.

Moreover, Judge Blumenfeld gave a particularly careful charge to the jury wherein he cautioned against accepting the testimony of Marrapese. (*See* e.g., Tr. 371-374). Judge Blumenfeld also carefully and exhaustively cautioned the jury against convicting the appellant merely if the jury felt that BUCCI knew that Marrapese, his client, was perjuring himself in the M-16 trial (Tr. 359-361). Judge Blumenfeld told the jury that it must find that BUCCI affirmatively and consciously undertook efforts to help Marrapese's perjury succeed (Tr. 361).[7] At sentencing, Judge Blumenfeld observed that the problem of a lawyer's ethical duties was not the relevant issue at

---

[6] See appellant's Supplemental Appendix, p. 2.

[7] Appellant was so satisfied by the Court's charge, and its characterization of Marrapese, that he observed, when asked if he took exception to the charge, "No, not at all. No way I can challenge that, Your Honor".

hand because the jury was required to find affirmative criminal action by the appellant in plotting and drafting the false testimony of his client. The jury was entitled under the evidence to conclude that the appellant had taken such affirmative action and that conclusion is sufficient to convict. *Petite* v. *United States*, 262 F.2d 788, 794-95 (4th Cir. 1959), *remanded on other grounds*, 361 U.S. 529 (1959); *United States* v. *Turcotte*, 515 F.2d 145, 149 (2d Cir. 1975).

Section 1623, Title 18, United States Code (A) does not require, in this context, proof of irreconciably inconsistent statements, and (B) is not constitutionally defective insofar as it abolishes the necessity for corroboration ("two-witness rule").

Appellant appears to argue in his brief at pp. 5-7, as a part of his argument on the sufficiency of the evidence, that Section 1623, Title 18, United States Code, requires proof that Marrapese made, and BUCCI induced, two irreconciably inconsistent statements. He also appears to argue that, this being the case, the government was required to show corroboration such as required by judicial fiat under Section 1621. Appellant does not develop this argument to the point where it becomes intelligible. To the extent we can discern any logic to the argument, we respond below.

A. Section 1623(c) provides, as an *alternate* method of proof, that an indictment can allege that the defendant has knowingly made two irreconcilable contradictory sworn statements, one of which is thereby necessarily false, without alleging which of the two is false. If, more-

over, the government shows that the defendant has made a sworn statement that is irreconcilable to a statement which *is* alleged, in the indictment, to be false, the former statement is sufficient to establish the falsity of the latter. First of all, this case does not involve *any* false statements of the defendant, ANDREW A. BUCCI, so the alternate method of proof, which is a circumstantial method of proof, which is a circumstantial method, is irrelevant. This case involves the defendant's conspiring with Marrapese to have the *latter* give false testimony and the government elected to prove this offense by *direct proof*, i.e. by Marrapese's own admission that he had previously perjured himself at the defendant's direction. The defendant argues, apparently, that Marrapese's grand jury testimony[8] was a necessary element of the government's proof at trial as to the falsity of his earlier M-16 testimony. This is absurd. Marrapese himself testified at the defendant's trial as to his earlier perjury. It was unnecessary, therefore, to use the *alternate* method to prove the falsity of his M-16 testimony. For obvious reasons, the government could not possibly intend to use the "irreconcilably inconsistent" method of proof in this case because only Marrapese's M-16 testimony was under his control and inducement. Only if, *arguendo*, the government's theory was that the defendant controlled both the M-16 testimony and the grand jury testimony in 1975 could we argue for his guilt without showing which version was true. In fact, however, both the indictment, the evidence, and arguments of *both* sides to the jury clearly established that the contested issue was the veracity of Marrapese's M-16 testimony.

---

[8] We can only assume that the defendant means the grand jury which indicted him in 1975 and before which Marrapese revealed his perjury at the 1972 M-16 trial. Marrapese did not testify at the grand jury which returned the M-16 indictment.

B. The government is not required to proceed under Section 1621, Title 18, United States Code, which requires, *inter alia*, proof satisfying the so-called "two-witness" rule, where a false statement before a court was made in violation of Section 1623, which abolished any requirement of proof by two or more witnesses. See Section 1623(e). The defendant's claim that a Section 1623 prosecution is constitutionally defective for this reason has been specifically rejected by the Second Circuit. *United States* v. *Ruggiero*, 472 F.2d 599 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States* v. *Camporeale*, 515 F.2d 184, 189 (2d Cir. 1975); *United States* v. *Lee*, 509 F.2d 645, 646 (2d Cir. 1975).

CONCLUSION

The evidence at trial was sufficient for the jury to conclude that William Marrapese and ANDREW BUCCI agreed, in a hotel room in December, 1972, to concoct a phony story to be told by Marrapese on the stand in his own defense in a federal criminal trial in Hartford, Connecticut, and that pursuant to that plan, and as an overt act, Marrapese did in fact take the stand and make false denials.

The conviction should be affirmed.

Respectfully submitted,

PETER C. DORSEY
United States Attorney for the District of Connecticut,
270 Orange Street,
New Haven, Connecticut 06510.

PAUL E. COFFEY
Special Attorney,
U.S. Department of Justice.

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-1200

UNITED STATES OF AMERICA

Appellee

v.

ANDREW A. BUCCI

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 17th day of September, 1976, deponent served the within Brief for the Appellee upon Andrew A. Bucci, 9 Steeple Street, Providence, R.I. 20903

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 17th day of September 1976

Shirley Amaker

SHIRLEY AMAKER
Notary Public, State of New York
No. 24 - 4502766
Qualified in Kings County
Commission Expires March 30, 1977